

**DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
NONRULE POLICY DOCUMENT**

Title: IDEM's Confidentiality Policy for its Compliance and Technical Assistance Program

Identification Number: OPPTA - 0001NPD

Date Originally Effective: December 1, 1996

Dates Revised: [Inset date of last Board meeting]

Other Policies Repealed or Amended: none

Brief Description of Subject Matter: Guidance document for implementation of IC 13-28-3-4

Citations Affected: IC 13-28-3-4

This nonrule policy document is intended solely as guidance and does not have the effect of law or represent formal Indiana Department of Environmental Management (IDEM) decisions or final actions. This nonrule policy document shall be used in conjunction with applicable laws. It does not replace applicable laws, and if it conflicts with these laws, the laws shall control. This nonrule policy document may be put into effect by IDEM thirty days after presentation to the appropriate board and after it is made available to public inspection and comment, pursuant to IC 13-14-1-11.5. If the nonrule policy is presented to more than one board, it will be effective thirty days after presentation to the last. IDEM will submit the policy to the Indiana Register for publication. Revisions to the policy will follow the same procedure of presentation to the board and publication.

**IDEM's Confidentiality Policy for its
Compliance and Technical Assistance Program
GUIDANCE DOCUMENT**

Background:

The Indiana General Assembly and Governor Evan Bayh established IDEM's Compliance and Technical Assistance Program ("CTAP" or "the program") on January 1, 1995, pursuant to IC 13-28-3. CTAP was created to provide assistance to entities regulated by IDEM. That assistance includes, among other things, environmental compliance assistance, public outreach and training sessions on environmental rules, and technical assistance on pollution control techniques and pollution prevention. CTAP is also authorized to "conduct other activities as required to improve regulatory compliance and to promote cooperation and assistance in meeting environmental requirements." (IC 13-28-3-2) To encourage participation in the program the statute requires that CTAP keep information about the identity of participants in the program confidential from the other IDEM divisions and the public.

Specifically, the confidentiality mandate in IC 13-28-3-4 states that "[i]nquiries made to the program and activities and documents of the program that identify or describe an individual facility or operation are confidential, unless a clear and immediate danger to the public health or environment exists. Information concerning inquiries, activities, and documents of the program that identify or describe an individual facility or operation may not be made available for use by other divisions of the department without the consent of the person who made the inquiry, participated in the activity, or provided the document."

Since its inception on January 1, 1995, CTAP has aggressively fulfilled its responsibilities and developed practices to ensure the confidentiality mandate is met. This nonrule policy was originally adopted in 1996 to clarify ambiguities in the statute and to explain the implementation of the program. This revision of the policy is intended to refine the policy in light of staff's experience with the program over the years and to account for increased participation in the program. Revising the policy also allows IDEM to present the policy to all relevant boards.

Policies and Guidance:

1. Who is in CTAP?

All CTAP staff members are trained on confidentiality procedures and take all necessary steps to safeguard confidential information. CTAP staff share confidential information only with other CTAP staff members. CTAP staff members are predominantly within the Division of Pollution Prevention and Technical Assistance. However, to increase the accessibility of the program to the public, trained CTAP

staff are also available in the regional offices, the Office of Agricultural Relations, the Office of Community Relations, the Office of Business and Legislative Relations, and the Office of Planning and Assessment. In addition to their responsibilities to the Compliance and Technical Assistance Program, CTAP staff members also perform a variety of other functions within IDEM that are not related to CTAP. Those functions that are not related to CTAP are not covered by the CTAP confidentiality requirement even if performed by CTAP staff.

For a current list of CTAP staff, please visit the following website:
<http://www.state.in.us/idem/ctap/staff.html>, or request a list of CTAP staff from OPPTA.

1(a) Managing staff movement in and out of CTAP.

All CTAP staff members are trained on CTAP confidentiality procedures before taking part in any CTAP activities and before being given access to confidential CTAP information. Included in the training are the criminal provisions of IC 5-14-3-10 for violations of confidentiality. All CTAP staff will be required to sign an agreement that they will follow the terms of this policy. When staff members leave OPPTA, their supervisor will review the policy with them again, emphasize that they must not disclose confidential information and that they must leave all confidential documents in the CTAP's offices.

2. *What information is covered by CTAP confidentiality?*

Inquires made to CTAP and activities and documents of CTAP that identify or describe an individual facility or operation are confidential. The only exceptions to this confidentiality mandate are if a clear and immediate danger to the public health or environment exists; or if the person who made the inquiry, or provided the information, consents to the information being revealed.

Because most CTAP staff members have responsibilities in addition to CTAP, not all information in their possession is covered by the CTAP confidentiality requirements. While confidential information will be secured and segregated from non-CTAP information, only information that identifies or describes an individual facility or operation seeking compliance assistance from CTAP will be considered confidential CTAP information. If CTAP staff receive information that is not provided in the context of seeking compliance assistance, it will not be protected by the CTAP confidentiality mandate. For example, information provided by a facility in an application for an award, or in an application for a recognition program, or in an application for a recycling grant, is not provided in the context of seeking compliance assistance and therefore not confidential CTAP information. Similarly, information provided for Toxic Release Inventory quality assurance, or for a supplemental environmental project proposal is not provided in the context of seeking compliance assistance and therefore not CTAP confidential.

Calls directed to CTAP staff will be presumed to be confidential CTAP inquiries until the caller clearly indicates that seeking compliance assistance is not the reason for the call. For example, if an employee of a facility reports environmental violations at the facility to CTAP personnel the call will be presumed to be confidential under CTAP. However, if the employee goes on to unequivocally state that the purpose of their call is to report the violation so IDEM will initiate an enforcement action his employer, it becomes clear that the reason for the call is not to seek compliance assistance. Because the caller clearly indicated that the reason for the call was not to seek compliance assistance the call is not confidential under CTAP. These "whistleblower" calls will be redirected to the IDEM complaint clearinghouse.

2(a) What is clear and immediate danger to the public health or the environment?

As noted above, CTAP information is confidential "unless a clear and immediate danger to the public health or environment exists." The terms in this phrase are not specifically defined by statute. Therefore, consistent with IC 1-1-4-1(1), IDEM will endeavor to take these words in their plain, or ordinary and usual sense. Indiana courts have stated that it is axiomatic in Indiana that the plain, ordinary, and usual meaning of non-technical words in a statute is defined by their ordinary and accepted dictionary meaning. Accordingly, the dictionary meaning of clear and immediate danger to the public health and environment is as follows. Danger is the exposure or vulnerability to harm or risk of harm. That danger is clear when it is obvious and easily perceptible. A danger is immediate when it is near to, or related to, the present. The clear and immediate danger is to the public health if public's condition of being sound of body, mind, or spirit is in danger. Similarly, the danger is to the environment if it endangers the complex of physical, chemical and biotic factors (as climate, soil, and living things) that act upon an organism or an ecological community that ultimately determine its form and survival.

The existence of a clear and immediate danger will be determined by IDEM staff using the above definitions as they are detailed in the CTAP Clear and Immediate Danger Worksheet. Determinations of a clear and immediate danger will be independently evaluated and confirmed by increasingly higher levels of IDEM staff in accordance with the CTAP procedures before a final determination is made.

2(b) *How can a person consent to waiver of confidentiality?*

As also noted above, information from CTAP that identify or describe an individual facility or operation may not be made available for use by other divisions of the department without the consent of the person who made the inquiry, participated in the activity, or provided the document. In essence, this means that the person who provides confidential information to CTAP may consent to make the information available for use by other divisions in IDEM or to the public. Except in extreme circumstances, CTAP staff will require waiver of confidentiality to be in writing before making the information available to the public or to other divisions of IDEM. In extreme circumstances, where prompt action is needed and the means to convey a written waiver are not readily available, IDEM will recognize a verbal waiver of confidentiality if it is clearly communicated to CTAP and verified by a second party at CTAP. Any waiver of confidentiality will also be noted in the compliance and technical assistance database.

2(c) *Where is assistance information stored? (Compliance and Technical Assistance Database.)*

In order to meet the requirements of IC 13-28-3-3 (Compliance and Technical Assistance Program Annual Report) more efficiently and better direct future agency outreach efforts, the Office of Pollution Prevention and Technical Assistance (OPPTA) has developed a confidential database that contains information related to all compliance and technical assistance efforts. The system will allow OPPTA to track the number and types of inquiries the program received and the services provided by the program and allow us to share information with other areas of IDEM without revealing confidential CTAP information. As an added benefit, CTAP staff will use data entered as a potential resource in answering the wide array of questions asked by our constituents.

The database has been placed on a secured server to ensure that the confidentiality of the information is maintained. Staff from the IDEM Information Technology section with access to information on the secure server will complete CTAP confidentiality training and sign confidentiality agreements. All reports will be developed in a manner that keeps confidentiality intact. Available reports include service type, county based, business type, workshops by type, and mailings by business type.

All CTAP staff enters their assistance efforts into the database. The database includes the incorporation of OPPTA's customer satisfaction survey. The survey, which can be found on OPPTA's website at: <http://www.IN.gov/idem/oppta/survey.html> will allow OPPTA to measure CTAP's effectiveness in providing compliance and technical assistance. Survey's submitted via fax or mail will be entered manually, while those submitted via the web will be entered automatically.